Limiting the Voting Power of the Supreme Court: Procedure in the States

ROBERT L. HAUSSER*

From the standpoint of *procedure*, should the United States Supreme Court be required to vote at least six-three on constitutional issues?

A frequent suggestion among the schemes that would curb the power of the Supreme Court of the United States to nullify Congressional Acts is the proposal to limit the power of the Court to do so except by a concurrence of at least six judges.[1]

* Legislative Drafting Bureau of Columbia University.

[1] The Supreme Court has invalidated eleven Federal laws by five-to-four decisions: *Ex Parte Garland* (1867), 4 Wallace 333, 18 L. Ed. 366 (Test Oath statute applicable to persons already admitted to the Bar); *Pollock* v. *Farmers' Loan & Trust Co.* (1895), 158 U.S. 601, 39 L. Ed. 1108, 15 S. Ct. 912 (Income Tax law); *Fairbank* v. *United States* (1901), 181 U.S. 283, 45 L. Ed. 862, 21 S. Ct. 648 (Tax on export bills of lading); *Employers' Liability Cases* (1908), 207 U.S. 463, 52 L. Ed. 297, 28 S. Ct. 141 (Liability on interstate employers for injuries of employees); *Hammer* v. *Dagenhart* (1918), 247 U.S. 251, 62 L. Ed. 1101, 38 S. Ct. 529 (Prohibition on interstate shipments from factories where child labor employed); *Eisner* v. *Macomber* (1920), 252 U.S. 189, 64 L. Ed. 521, 40 S. Ct. 189 (Income tax on salaries of Federal judges); *Knickerbocker Ice Co.* v. *Steward* (1920), 253 U.S. 149, 64 L. Ed. 834, 40 S. Ct. 438 (Application of State compensation laws to maritime injuries); *Newberry* v. *United States* (1921), 256 U.S. 232, 65 L. Ed. 913, 41 S. Ct. 469 (Senatorial campaign expneditures); *Burnett* v. *Coronado Oil & Gas Co.* (1932), 285 U.S. 393, 76 L. Ed. 815, 52 S. Ct. 443 (Taxation of income of State lands); *Railroad Retirement Bd.* v. *Alton Ry. Co.* (1935) 295 U.S. 330, 79 L. Ed. 1468, 55 S. Ct. 758 (Railroad Retirement Act); *Ashton* v. *Cameron Cty. Water Improvement District* (1936), 298 U.S. 513, 80 L. Ed. 1309, 56 S. Ct. 892 (Municipal Bankruptcy Act). And by five-to-three decisions: *United States* v. *Moreland* (1922), 258 U.S. 433, 66 L. Ed. 700, 42 S. Ct. 368 (Jurisdiction of the juvenile court of District of Columbia); *Adkins v. Children's Hospital* (1923), 261 U. S. 525, 67 L. Ed. 785, 43 S. Ct. 394 (Minimum wage for women in District of Columbia). At least six judges have concurred in all

Such a plan would give a more positive assurance that the Supreme Court will resolve all doubts of validity in favor of the statute.

But, may this result be accomplished by statute? Would it eliminate any real evil in our Federal system? These questions raise the problem of whether Congress has the power to change the voting ratio within the Court to arrive at certain decisions. And, even should this power be admitted, would it be wise to require the Supreme Court to uphold every Congressional Act unless six justices concurred in opposing it?

The answers are necessarily inconclusive because Congress has never attempted such limitation, nor has the Supreme Court ever openly committed itself on the subject.[2] One must speak, therefore, in terms of analogies from the attempts of the States to regulate voting ratios within their own courts.

Although, throughout our national history, decisions by the State courts have aroused State legislators to attempt to check the veto prerogative of the courts, summary inquiries reveal no State legislature that has declared *by statute* a change in the voting requirements of its supreme court before it could invalidate a law. The voters of three States have effected the change by amendments to their constitutions.[3] An answer to the first question, therefore, is still speculative. But judicial practice in the three States that have limited the voting power of their supreme courts has been extensive enough to permit reasonable

other cases holding Acts of Congress invalid. *Cf.* Culp, "A Survey of Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States" (1929), 4 Indiana L. J. 386; Norton, "The Supreme Court's Five-to-Four Decisions" (1923), 9 A.B.A.J. 417; R. E. Cushman, "Constitutional Decisions by a Bare Majority of the Court" (1921), 19 Mich. L. R. 771.

[2] *Cf. United States* v. *Klein* (1871), 13 Wallace 128, 20 L. Ed. 519, and Fite, Katherine B., and Rubenstein, Louis B., "Curbing the Supreme Court—State Experiences and Federal Proposals" (1937) 35 Mich. L. Rev. 762.

[3] Ohio Constitution, art. IV, sec. 2, adopted 1912; North Dakota Constitution, art. IV, sec. 89, adopted 1918; Nebraska Constitution, art. V, sec. 2, adopted 1920; a similar proposal in 1914 was not approved by the voters of *Minnesota.*

conclusions as to how effectively such amendments have solved the undemocratic result of a decision by a bare majority of the highest court nullifying a law that might possibly have been passed by a unanimous legislature and approved by all the justices in the lower courts. This study will classify the decisions under the three State constitutions to enable one to appraise a similar check upon the Federal courts.

OHIO

Only after stubborn resistance did the General Assembly of Ohio retreat before the advance of the doctrine of judicial supremacy in lawmaking. The Constitution of 1803[4] niggardly provided:

> The judges of the supreme court . . . shall be appointed by a joint ballot of both houses of the general assembly, and shall hold their offices for the term of seven years, *if so long they behave well.*

And Salmon P. Chase, in commenting in 1833 upon the allotment of authority among the three branches of Ohio government, wrote:

> The judicial department has power enough; but, is not, perhaps, sufficiently secured in the independent and unbiased exercise of that power.[5]

This "judicial insecurity" in Ohio became evident soon after the decision in *Marbury* v. *Madison*[6] when the Ohio judges likewise for the first time attempted to declare a State law unconstitutional. An act of 1805,[7] defining the jurisdiction of the justices of the peace, had empowered the local magistrates (sitting *without a jury*) to hear civil cases involving more than $20,[8] and prohibited a plaintiff from recovering costs in actions

[4] Art. III, Sec. 8—Chase, Salmon P., *Statutes of Ohio* (Cincinnati: Corey & Fairbank, 1833), p. 79.

[5] Chase, *Statutes of Ohio*, p. 35; *cf.* William T. Utter, "Judicial Review in early Ohio," Mississippi Valley Historical Review, Vol. XIV, p. 3.

[6] (1803) 1 Cranch 137, 2 L. Ed. 60.

[7] 3 Ohio Laws (1804-5), p. 14.

[8] *Id.* Sec. 5.

commenced by original writ from the Court of Common Pleas for amounts between $20 and $50.[9]

Judge Calvin Pease of the Common Pleas and Justices Huntington and Tod, comprising a majority of the Supreme Court, promptly held both sections void, not alone because the Ohio Constitution declared the right of trial by jury to be inviolate,[10] but also because the Seventh Amendment of the national Constitution provided that in Common Law actions involving more than $20 the right of trial by jury shall be preserved [!]. Moreover, Judge Pease frequently intimated the power of the Supreme Court to suspend other legislation.[11]

The representatives of the Assembly promptly impeached Pease and Tod[12] for this high-handed attack on the Legislature. The Senators, sitting as the High Court of Impeachment, tried Judge Tod first. He pleaded the purity of his convictions, and was unanimously acquitted. Pease too was absolved, but only after a vote of fifteen for his conviction and nine for acquittal—barely short of the two-thirds vote necessary for ouster.

Constitutional Convention of 1912.

This early distrust of the judiciary was revived in the Constitutional Convention of 1912 when the Progressives sought eagerly to check the conservatism of the courts in invalidating legislative acts[13]—a power which, incidentally, was expressly recognized in neither the Constitution of 1803 nor that of 1851. Thus, on April 3, 1912, Chairman John W. Peck of the Judiciary Committee submitted proposal 184, that no Act of the

[9] *Id.* Sec. 29.

[10] Constitution of 1803, Art. I, Sec. 8. The case was *Rutherford* v. *McFaddon*, reported in Liberty Hall and Cincinnati Mercury, Nov. 3 and 10, 1807.

[11] Chase, *Statutes of Ohio*, p. 39.

[12] No action was taken as to Huntington, who meanwhile had resigned and had been elected governor. *Cf.* F. R. Auman, "The Course of Judicial Review in the State of Ohio" (1931) 25 American Political Science Review 367.

[13] Palfrey, John G., "The Constitution and the Courts" (1913) 26 Harv. L. Rev. 507.

Assembly shall be declared void except by concurrence of *all* the judges of the Supreme Court.[14]

The Bar Association wailed in disapproval[15] and forwarded the reason that a minority on the Supreme Court would be able to control a decision on constitutional questions. To allow a minority of the Court to sway the decision would be undemocratic! In answer to the Bar Association, one delegate remarked:

> I take it that we are not met here to please the bar association, but to adopt a judicial system which will be beneficial to the whole people.[16]

The champions of proposal 184, to require unanimous concurrence of the Court before it could void a statute, advocated legislative supremacy in State government. The following counterpoint was typical during the Convention:

> *Mr. Jones:* "Suppose you have a case in the common pleas court where the common pleas judge holds a law unconstitutional, and the court of appeals also holds the law unconstitutional. Now you go to the supreme court of six judges, and five of them declare it unconstitutional. Do you think it the right thing to let that one man in the supreme court defeat the judgment of the five members of the supreme court, the three circuit judges and the common pleas judge?"
>
> *Mr. Anderson:* "You didn't start back far enough. Where did the act come from?"[17]

Later, it was suggested that in case of the inability of the Supreme Court to agree, the decision of the Court of Appeals should stand.[18]

The first amendment was offered by Mr. Peck, who proposed that constitutional decisions of the Supreme Court need not be unanimous if the Court of Appeals should declare the statute void.[19] A second amendment would have allowed the

[14] 2 *Proceedings and Debates, Constitutional Convention of the State of Ohio 1141* (1912).

[15] *Id.* 1028 *ff.*

[16] From Stene, Edwin O., "Is There Minority Control of Court Decisions in Ohio?" (1935) 9 U. of Cinn. L. Rev. 23.

[17] *Proceedings and Debates, Constitutional Convention of the State of Ohio 1090* (1912).

[18] *Id.* pp. 1127-28.

[19] *Id.* p. 1141.

Supreme Court to declare a law invalid upon a concurrence by all but one of the seven justices.

The provision as finally enacted was a combination of the first and second amendments:

> No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void.[20]

The most cogent justification in support of this hybrid limitation, in addition to the instinctive desire to check the uncontrolled powers of the judges, lay in the movement to give litigants one trial and an opportunity for a single, but final, appellate review. It is nonsense to permit a disappointed suitor to run his case up the hierarchy of courts. The chances for a persistent party are great that one of the courts of review will change the decision. A poor litigant may be financially unable to defend his judgment through the course of appeal. In many cases the delay itself in granting relief thwarts justice. Hence, the movement for "one trial, one review."

Mr. Peck, author of the original proposal 184, agreed:

> The great thing which we are after is having the intermediate *court of appeals* a court of *final jurisdiction* in all ordinary cases.[21]

Under this new arrangement, the litigants might hold their trial in a Common Pleas Court or in a court of first instance created by the Legislature.[22] The Courts of Appeals, at least one term to be held annually in each of the 88 counties, would have complete power of judicial review. And, except for an enumerated list of cases, their decisions would be final.[23]

[20] Ohio Constitution, art. IV, sec. 2 (adopted Sept. 3, 1912). Since 1912 the Supreme Court has comprised seven judges. Everett P. Wheeler of New York, in "The New Constitution of Ohio" (Dec. 13, 1912) 75 Central Law Journal 437, roundly criticized the Amendment as an attack on the independence of the judiciary. However, Wheeler denounced every other major action of the Convention.

[21] 2 *Proceedings and Debates, Constitutional Convention of the State of Ohio 1141* (1912).

[22] Ohio Constitution, art. IV, secs. 1, 3, 4.

[23] *Id.* art. IV, sec. 6: "The courts of appeals shall have . . . appellate

Thus, in a case involving the constitutionality of a statute, the presiding judge in the Common Pleas may without restraint declare the Act invalid. District Courts of Appeals, intended as the final courts of review in most cases, can likewise uphold or invalidate a statute by a bare majority of their membership. Such a decision may be appealed to the Supreme Court. But, consonant with its limited jurisdiction in other cases,[24] the Supreme Court can overturn a decision of a Court of Appeals upholding a statute only by concurrence of at least six of the seven judges. If a Court of Appeals has declared a law unconstitutional, then the highest body can affirm that judgment by a bare majority vote.[25]

jurisdiction in the trial of chancery cases, and, to review, affirm, modify, or reverse the judgments of the courts of common pleas, superior courts and other courts of record within the district as may be provided by law, and judgments of the courts of appeals *shall be final in all cases*, except cases involving questions arising under the constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court" (adopted Sept. 3, 1912).

[24] *Id.* art. IV, sec. 2: The Supreme Court "shall have . . . appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law" (adopted Sept. 3, 1912).

[25] This system positively forces the judiciary in Ohio to resolve all doubts in favor of the constitutionality of a statute. For example (1) the Act will be declared *valid* even if the Common Pleas judge, all three judges of a Court of Appeals, and three justices of the Supreme Court believe the law unconstitutional, so long as four justices of the Supreme Court hold otherwise; the case is similar in all 48 states. But, unlike the procedure in the other states, there are now three situations in Ohio requiring abnormal majorities to invalidate a statute. (2) An Ohio law will fall (ultimately) only if *both* a majority of two of a Court of Appeals and a majority of four members of the Supreme Court, six of the seven justices must concur in voiding the statute; bare majority of the highest court have voted against it, despite how the intermediate court of appeal has ruled. (3) If a majority of two members of an Ohio Court of Appeals have upheld the Act, then it requires six of the seven Supreme Court justices to overturn the decision; in 45 other states, a bare majority of the highest court could effect the same result. (4) If a statute is challenged in a case heard in the original jurisdiction of the Ohio Supreme Court vote against the Act; in 45 other states the Act will fall if a in 45 other jurisdictions, a bare majority of the court could so rule.

Hence, in any proceeding, to have an Ohio law declared unconstitutional

Nevertheless it is obvious that the chances for a statute to be held void may vary according as to how the Court of Appeals ruled, as from which Court of Appeals the case has been carried, and as to whether the issue was tried in the original, or appellate, jurisdiction of the Supreme Court.

(1) Courts of Appeals are designed as the intermediate courts in Ohio; in a few subjects they have concurrent original jurisdiction. From the discussion in *footnote 25*, dealing with cases coming to the Supreme Court on appeal, one will readily see how five members of the Supreme Court may be consistent year after year in believing *X*-statute to be invalid; yet whether they can give effect to that belief depends on what the court below has done.

(2) There are nine Courts of Appeals.[26] One Court of Appeals might uphold *X*-statute, so that the five Supreme Court judges who consistently oppose the *X*-statute must see their tribunal rule in favor of the Act. Is this decree binding on all appellate districts, and for all time? Or, may a second Court of Appeals overthrow the statute, so as to allow the five Supreme Court justices now to affirm its invalidity? Also, may a new set of judges on the first Court of Appeals disregard the prior decision and decide against the *X*-statute, thus to set up a straw-man for the five superior judges?

(3) Does the restriction in the Ohio Constitution violate any guarantee in the Federal Constitution?

(4) Does Art. IV, Sec. 2 limit the Supreme Court in cases tried within its original jurisdiction? If so, then if a litigant, bringing mandamus, must rely on the validity of *X*-statute to succeed in his action, would he not be more wise to invoke the original mandamus jurisdiction of the Supreme Court, rather than commence suit in a lower tribunal, which (a) might hold

the lawyer must convince at least six of the ten judges of the Supreme Court and the Court of Appeals. A democratic answer to the Bar Association of 1912. In all other jurisdictions, the number will be fewer. *Quaere*, how is the Indiana Supreme Court to rule on an Ohio law?

[26] *Throckmorton's Ohio General Code* (June 1937), Appendix, title IV, ch. 1, sec. 14227 (effective July 22, 1935).

the statute unconstitutional so as (b) to allow a bare majority of the Supreme Court to affirm the decision?

(5) In certain proceedings the Constitution and the General Assembly have authorized appeals to the Supreme Court direct[27] from order of administrative boards. Where a board has recognized the validity of a statute, and an appeal is taken, must at least six judges of the Supreme Court concur before voidin gthe act? What if the board had nullified the statute?

(6) Is a municipal ordinance or a ruling of a board a "law" within the meaning of Art. IV, Sec. 2? May the Supreme Court invalidate an ordinance only by an abnormal majority? Or, can the Court void it by a bare majority?

(7) Is the Supreme Court likewise restricted when it votes in an "advisory" opinion in a criminal case (Ohio G.C. Sec. 13446-4)?

The constitutional cases arising since 1912 have answered almost all the problems.

I

Thus far, the Supreme Court has followed a muddled practice when it decides constitutional cases on appeal.

The case of *Barker et al.* v. *City of Akron* (Apr. 2, 1918), 98 Ohio St. 446, 121 N.E. 646, was the first real test of the voting restriction. The Court of Appeals for Summit County had sustained Ohio G.C. Sec. 5052[28] requiring the expenses of conducting both general and special elections to be borne by the county treasurer as other county expenses. In proceeding on error, four Supreme Court justices believed the statute unconstitutional. But because three justices did not deem the section violative of any constitutional restriction, the Court was forced to affirm the decision of the appellate division.

The next constitutional case brought on an appeal to the Supreme Court presented the opposite situation contemplated

[27] Ohio Constitution, art. IV, sec. 2; Ohio G. C. (June 1937) secs. 551-6.
[28] Now Sec. 4785-20.

by Art. IV. In *Patten* v. *The Aluminum Castings Co.* (May 16, 1922), 105 Ohio St. 1, 136 N.E. 426, the plaintiff Patten, while employed by the defendant Casting Co. in painting its building, sued for injuries sustained from a fall from a scaffold, which plaintiff alleged had been negligently erected by defendant.

In its defense, the Casting Co. denied the right of Patten to sue in the Common Pleas. Rather, he should be limited to recovery under the Workmen's Compensation Act, for both parties conceded that the defendant had complied with Ohio G.C. Sec. 1465-69, allowing it to become a self-insurer and thus restrict the injured employee's damages to a statutory schedule.

Yet, according to Art. II, Sec. 35 of the Constitution, the employee was not to be limited to this statutory rate if the employer has failed "to comply with *any lawful requirement* for the protection of the lives, health and safety of employees." And Patten claimed that the defendant had not complied with every "lawful requirement" because the defendant's negligence constituted a violation of Ohio G.C. Sec. 12593, which imposes imprisonment or a fine on an employer supplying "defective scaffolding." In answer, the Casting Co. denied that Sec. 12593 was one of those "lawful requirements" in the contemplation of Art II, Sec. 35.

Recovery for $8,750 in the Common Pleas was reversed by the Court of Appeals for Cuyahoga County.[29] The appellate court ruled only that Sec. 12593 was not to be regarded as one of the "lawful requirements" of Art. II, Sec. 35. It discussed nothing of the constitutionality of Sec. 12593. The Supreme Court affirmed the decision for the defendant, by a vote of five-to-two.[30]

[29] (July 1, 1920), 13 O. App. 188, 31 O.C.C. (N.S.) 481.

[30] Judge Jones, whose opinion was first, voted for the defendant since he believed Sec. 12593 (punishing a man criminally for *negligent* raising of *defective* scaffolding) to contain too indefinite standards to impose criminal liability. Hence Sec. 12593 is void and cannot be considered one of the

The third situation for a case on review: In *Morton* v. *State of Ohio* (July 5, 1922), 105 Ohio St. 366, 138 N.E. 45, the Supreme Court deemed itself able, by concurrence of six judges, to declare an act unconstitutional after it had been upheld in a Court of Appeals. James Morton had been indicted for robbery and was confined in jail on account of his inability to furnish bail. He petitioned the trial court to be allowed to go to Chicago to attend the deposing of his material witnesses. But the judge refused, because Ohio G.C. Sec. 13668 did not allow defendants who were *confined in jail* to attend the taking of depositions outside the State, although it permitted a defendant *not confined in jail* to do so. A conviction was affirmed in the Court of Appeals of Cuyahoga County, and the Supreme Court brought error.

"lawful requirements," the violation of which enables an injured plaintiff to sue for unrestricted damages in a trial court. Only Judges Matthias and Robinson concurred in the opinion.

Justice Hough concurred in the judgment, but on the theory that Sec. 12593 was not one of those "lawful requirements" contemplated by art. II, sec. 35. He expressed no view on the constitutionality of Sec. 12593. Indeed, Judge Hough carefully noted: "I know of no reason by which the constitutionality of the act can be assailed. The argument is made that if the statute is not available to Patten in this case, it must be unconstitutional. This is no true. A law may be in harmony with various provisions of the constitution, and yet fail to be operative, or enforceable, or applicable to a given situation." Chief Justice Marshall also concurred in the judgment, but "*solely* upon the ground that there is no evidence shown by the record to support the verdict and judgment" for the plaintiff, although, it is true, he made a totally unwarranted dictum that Sec. 12593 was unconstitutional.

Carl L. Meier, in "Power of the Ohio Supreme Court to Declare Laws Unconstitutional" (1931) 5 U. of Cinn. L. R. 293, at p. 299, hence says Sec. 12593 "was *held* null and void by a bare majority of the court on the ground that it was indefinite and general in its requirements." In view of the above analysis of the opinions of the majority decision, I must disagree with Meier. At best only three judges—Jones, Matthias and Robinson—held Sec. 12593 to be void; and even then they did not *expressly state* such a view. The other four judges either held Sec. 12593 constitutional or contended its validity not to be at issue (i.e., Marshall). *Patten* v. *Aluminum Co.*, therefore, is not an apt illustration of the operation of the limitation on the Ohio judiciary. This case was overruled by dictum of Judge Allen in *Sprinkler* v. *Fender* (1923), 108 Ohio St. 149, 141 N.E. 269; in 1923 art. II, sec. 35 of the Ohio Constitution was amended so as to substitute the words "specific requirement" for the words "lawful requirement."

Four judges of the Supreme Court[31] voted for reversal of the conviction on the holding that, to allow a defendant *not in jail* to view deposition of witnesses examined outside the State but to deny this privilege to defendants *held in jail*, was a denial of the equal protection clause of Art. I, Sec. 2 of the Ohio Constitution. These four judges would not alone have constituted a majority sufficient to reverse the judgment on the ground of the invalidity of Sec. 13668. Chief Justice Marshall dissented without comment. Judges Wanamaker and Johnson volunteered their uncalled-for remark that Sec. 13668 denied equal protection, but then voted *to affirm the conviction* since Morton's original petition to the trial court was defective in that it did not show the purported witnesses in Chicago to be those "whose attendance cannot be had at the trial."[32]

The first four judges seized upon the dictume of Wanamaker and Johnson and announced that they had the requisite six votes to declare Sec. 13668 invalid.

Does this case support the proposition that if six justices *venture their opinion* as to the unconstitutionality of a statute, then the trial courts are *bound to* ignore the act? If so, the Constitutional check on the voting power of the Supreme Court has been eaten into by this unforeseen interpretation.[33]

The fourth circumstance: the case of *McBride, Treas.* v. *White Motor Co.* (Dec. 12, 1922), 106 Ohio St. 656, 140 N.E. 942, introduced a new obstacle to the attempts of the Supreme Court to invalidate a statute affirmed in the court below. Art. IV, Sec. 2 requires a "concurrence of at least all

[31] Robinson, Hough, Jones, and Matthias.

[32] 105 Ohio St. 366, at 381.

[33] In my opinion, the conviction should have been sustained, by a vote of three-to-four, with an opportunity of appeal to the United States Supreme Court on the ground of a denial of equal protection under the Federal Constitution. I believe the more cautious observance of the distinction between holding and dictum led to a more logical result in *Fullwood* v. *Canton* (1927), 116 Ohio St. 732, 158 N.E. 171, discussed *infra* p. 35.

Sec. 13668 was repealed in 1929; now Sec. 13444-11 contains the provisions in unobjectionable form.

but one of the judges"; hence, if any two justices should be incapacitated or should disqualify themselves, the remaining judges may be unanimous in believing the statute invalid, yet must affirm its constitutionality. In the *McBride* case, reviewing the validity of Ohio G.C. Sec. 5327 upheld by a Court of Appeals, three justices disqualified themselves. It was impossible for the remaining members to declare the Act unconstitutional.[34]

Again five members of the Supreme Court were unable to void a statute because of a favorable decision of the Court of Appeals below, in *Shook et al.* v. *Mahoning Valley Sanitary District* (Mar. 27, 1929), 120 Ohio St. 449, 166 N.E. 415.[35] Although an outspoken critic of "minority" court decisions,[36] Chief Justice Marshall did not hesitate to concur with Judge Day in overriding the view of his five associates.[37]

[34] The constitutional dispute had arisen over the declaration in Sec. 5327 that accrued debts might be credited against earnings in computing net income of a corporation for taxation purposes; were accrued taxes owing to the Federal government thus deductible?

Sec. 5327 now forbids the taxpaying corporation from deducting the taxes payable to the United States from the net credits to be taxed by Ohio. The old section, as amended on March 6, 1923 (110 O.L. 23) to reverse the confused interpretation of the McBride case, was upheld in *Tax Commission of Ohio* v. *National Malleable Castings Co.* (June 21, 1924), 111 Ohio St. 117, 144 N.E. 604, five judges believing it constitutional. A second amendment, effective on July 18, 1933 (115 O.L. 548), altered other provisions of the section.

In *Royal Green Coach Co.* v. *Public Utilities Commission* (April 1, 1924), 110 Ohio St. 41, 143 N.E. 547, a statute was upheld although five judges believed it void. Wanamaker, J., did not participate; *infra*, p. 34.

[35] The Court of Appeals for Mahoning County had upheld the validity of Ohio G. C. secs. 6602-34 to 6602-106, authorizing the creation of the Mahoning Valley Sanitary District to supply water to Youngstown and Niles.

[36] *Cf.* his opinion in *Board of Education* v. *Columbus* (1928), 118 Ohio St. 295, 160 N.E. 902, *infra*, p. 25.

[37] An appeal to the United States Supreme Court was dismissed without discussion in *Gottlieb* v. *Mahoning Valley Sanitary District et al.* (April 14, 1930), 281 U.S. 770, 74 L. Ed. 1177, 50 S.C. 333. In *State ex rel. Bryant* v. *Akron Park District* (1930), 120 Ohio St. 464, 166 N.E. 407, the votes of Marshall and Kinkade were likewise able to negative the dissenting votes of the remaining five justices, *infra*, p. 27.

II

Since the judgment of the Supreme Court is influenced by what a Court of Appeals has decided, the problem arises whether a statute, upheld by the Supreme Court by a subnormal majority because of a favorable holding of one intermediate court, will bind the courts in other appellate districts, or even the trial courts in the district where the original case arose. Ohio judges have faced these procedural difficulties in ruling on two statutes.

This cloud shadowed the fate of Ohio G.C. Sec. 1465-74.[38] In *De Witt et al.* v. *The State ex rel. Crabbe, Att. General* (Nov. 13, 1923), 108 Ohio St. 513, 141 N.E. 551, the Supreme Court reviewed the decision of the Court of Appeals for Fayette County[39] holding the 50% penalty provision of this statute constitutional.[40] Five judges believed the fine a violation of Art. I, Sec. 16 of the Ohio Constitution. But since two justices voted in favor of the penalty, the Court was forced to recognize Sec. 1465-74 as valid, at least for the Second Appellate District.[41]

Did this minority decision set a binding precedent on the trial courts? In 1927, in a similar penalty proceeding by the State before the Hamilton County Common Pleas (First Appellate District), trial-Judge Darby was asked to recognize the

[38] Ohio G. C. Sec. 1465-74 provided that when the Industrial Commission has awarded a claim under the Workmen's Compensation Act, the amount of the award shall be paid by the employer within ten days after receiving notice; in the event of the failure or refusal of the employer to pay within the ten-day period, the award shall become a claim for liquidated damages, which, *with an added penalty of 50%*, may be collected in an action brought by the State on behalf of the person entitled.

[39] In the Second Appellate District.

[40] The employers, De Witt were ordered penalized 50% of the award of the Industrial Commission for their having refused to pay the claim on the ground that they were not the employers of the deceased.

[41] *Cf.* 39 A.L.R. 1181n, "Constitutionality of statute penalizing unsuccessful appeal to courts from action of administratiev board"; and 43 A.L.R. 335, at 365, "Independence of contract considered with relation to scope and construction of statutes."

validity of Sec. 1465-74.[42] Instead, after remarking that "but for the manner in which the *De Witt* case reached the Supreme Court, the decision of the court would have been to the contrary,"[43] he proceeded to declare the penalty clause unconstitutional. His only justification was the opinion of the five minority judges. The State did not appeal.[44]

The 50% penalty provision in Ohio G.C. Sec. 1465-74 reached its finale in *State, for Benefit of Bredwell et al.* v. *Hershner et al.* (Apr. 18, 1928), 118 Ohio St. 555, 161 N.E. 334. The dependant of a deceased employee, having received a compensation award from the Industrial Commission, sued in the Common Pleas of Butler County for judgment and for the 50% penalty for failure of the employer and his receiver to pay within ten days. A judgment for both items was reversed in the Court of Appeals (First Appellate District, one reason being that the penalty was unconstitutional.[45] On error to the Supreme Court, six judges affirmed the invalidity of the penalty.[46]

[42] *State of Ohio, ex rel. C. C. Crabbe, Att. General* v. *J. F. Crawford* (Mar., 1927), 26 O.N.P. (N.S.) 519.

[43] *Id.* at 520.

[44] Although the possible correctness of Judge Darby's *conclusion* may be conceded, I believe his *reasoning* is unfortunate. In order to have allowed himself freedom to examine the constitutionality of the statute *de novo*, Judge Darby might have recalled that the power of the Supreme Court was shorn in 1912 so as to make each "court of appeals a court of final jurisdiction in all ordinary cases." (*Proceedings and Debates 1141.*) Hence, the Supreme Court decision in the *De Witt* case was directed to affirming the Court of Appeals of the Second Appellate District alone, and the courts in the First Appellate District should be still free to decide for themselves. On the other hand, for a trial court blindly to follow the minority opinion of the Supreme Court *as authority* is to nullify the program of the Convention of 1912, however illogical it may have been. Judge Darby's logic was criticized by his colleague, Bell, J., of the same court, in *Michaelson* v. *Cincinnati* (1928), 27 O.N.P. (N.S.) 100, at 101, *infra*, p. 39n.

[45] In this case, *Antenem, Recr.* v. *The State, ex rel. Bredwell et al.* (June 10, 1927), 27 Ohio App. 4, 160 N.E. 637, Hamilton, P. J., dismissed the statute with the bare statement: ". . . we are of the opinion that that part of the act was unconstitutional and void."

[46] *Aff'd.* in *The State, ex rel. Davis* v. *Industrial Commission of Ohio* (Apr. 18, 1928), 118 Ohio St. 340, 161 N.E. 32.

This majority was large enough to control a case coming from any appellate district. *Quaere,* if the Supreme Court had affirmed the decision of the Court of Appeals for Butler County by a vote of only five-to-two, would this *Hershner* case bind the judiciary of the Second Appellate District (Fayette County)? In view of the decision of the Court of Appeals of Fayette County in the *De Witt* case, *supra,* a five-to-two majority would be ineffective.[47] How else can we give logical effect to the expression of the Convention of 1912?

The history of Ohio G.C. Sec. 3963 witnessed a similar disregard of one Court of Appeals for the two-to-five decision of the Supreme Court affirming the decision of another Court of Appeals. Sec. 3963 requires municipalities operating their water utility to furnish water free to the public school buildings in the corporate limits. Despite this order, the City of East Cleveland sought payment from the local Board of Education for service, but was denied relief both in the Common Pleas of Cuyahoga County and in the Court of Appeals for the Eighth Appellate District, which upheld the statute challenged by the city as unconstitutional.[48] On error, Justices Jones and Day constitute a "majority" sufficient to affirm the judgment below; Marshall, Matthias, Allen, Kinkade and Robinson were an ineffective dissent (*City of East Cleveland* v. *Board of Education of City School Dist. of East Cleveland* (May 26, 1925), 112 Ohio St. 607, 148 N.E. 350).[49]

The next year the City of East Cleveland tried again to

[47] Sec. 1465-74 Gen. Code has since been amended (effective July 8, 1931) to eliminate the penalty of 50%. The Ohio Constitution, Art. II, Sec. 35, as amended in 1923, allows the Industrial Commission to assess a penalty of 50% where it is found that the injury resulted from failure of the employer to observe specific safety requirements.

[48] *East Cleveland* v. *Board of Education* (June 23, 1924), 2 O. L. Abs. 713.

[49] The "minority" believed the section in violation of Art. XVIII, Sec. 4 of the Constitution, giving a municipality the power to operate public utilities and charge for service. Sec. 3963 still stands in the Code (June 1937): "No charge shall be made by a city . . . for supplying water . . . for the use of the public school buildings in such city. . . . "

charge the Board for water service, in the hope that Judges Washburn, Funk and Pardee of the Ninth Appellate District, who were temporarily sitting for the Eighth Appellate District (in which East Cleveland is located), would reverse the previous decision of the Supreme Court. In *City of East Cleveland* v. *Board of Education of City School Dist. of East Cleveland* (Mar. 28, 1927), 25 Ohio App. 192, 157 N.E. 575, these visiting judges upheld Sec. 3963 Gen. Code, without citing or referring to the previous litigation.[50]

Soon after, the City of Columbus sought to test anew the validity of Sec. 3963. The Court of Appeals of Franklin County (Second Appellate District) upheld the charge of the city and struck down the statute.[51] Hence, on appeal, the same five "minority" justices of the East Cleveland case were able to declare the statute void, at least for the Second District. But, as to the other districts?[52]

In Newark v. *Board of Education* (Jan. 9, 1931), 28 O.N.P. (N.S.) 297, Judge Moore of the Licking County Common Pleas (Fifth Appellate District) faced the problem of resolving the conflicting Supreme Court cases. He sought to devise a rule-of-thumb for trial judges: the Common Pleas judge should adopt the view of the latest Supreme Court decision until the local Court of Appeals has ruled. Applying this rule, he declared the law invalid for Licking County.

[50] Later judges (*Cf.* Marshall, C. J., in *Bd. Education* v. *City of Columbus* (1928), 118 Ohio St. 295, 160 N.E. 902) have regarded this decision of the visiting judges as validating Sec. 3963 in the *Ninth* Appellate District because the judges came from the Ninth District. But, do the *individual judges* of the Ninth District, sitting in the Eighth District, decide the law for their home area; or does the *Court* of the Ninth District set the precedents?

[51] *Columbus Board of Education* v. *City of Columbus* (Oct. 27, 1927), 6 O. L. Abs. 288.

[52] Attorney General Edward C. Turner, in an opinion on May 18, 1928 (O.A.G. 1928, No. 2126), assumed that Sec. 3936 had now been invalidated for all jurisdictions. On the other hand, his successor, Gilbert Bettman, urged that the statute be regarded as valid in the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Districts until the respective Courts of Appeals should hold otherwise (August 7, 1929, O.A.G. 1929, No. 712).

The Fourth Appellate District sided with the Second District and with Licking County when, in *Board of Education of Wellston City School District* v. *City of Wellston* (Nov. 1, 1932), 43 Ohio App. 552, 184 N.E. 28, the Court of Appeals for Jackson County nullified the statute, on the theory that it is the "duty of the Court of Appeals . . . to follow the last word of the Supreme Court."

In *Board of Education of Willard Village* v. *Village of Willard* (Dec. 4, 1935), 130 Ohio St. 311, 199 N.E. 74, the Supreme Court ended the whole controversy: six judges[53]—sufficient to overrule any type of appeal—affirmed the decision of the Court of Appeals for Huron County (Sixth District) holding the section invalid.[54]

III

American lawyers are accustomed (1) to a decision of the trial court arrived at by the *majority* of the judges sitting at the trial; (2) to appellate courts reaching decisions by simple majority vote; and (3) to an appeal which finally reaches a single high court, which tends to make the operation of statutes uniform throughout the state. Insofar as Art. IV, Sec. 2 abridges any of these features, does it violate the Federal Constitution?

The United States Supreme Court has upheld Art. IV, Sec. 2, at least in its restriction of No. (2) above, in *State of Ohio*, ex rel. *Bryant* v. *Akron Metropolitan Park District for Summit County* (Mar. 12, 1930), 281 U.S. 74, 74 L. Ed. 710, 50 S.C. 228. Taxpayers in Akron and Cleveland had petitioned their Common Pleas to enjoin the completion of certain parks because Ohio G.C. Secs. 2976-1 to 2976-10i, allowing the local Probate judge to determine the need for the parks, contained an unconstitutional delegation of legislative power. A dismissal

[53] Weygandt, C. J., Stephenson, Williams, Matthias, Day, and Zimmerman.

[54] *Cf.* the acquiescence to this view in 1936 O.A.G. No. 5147, 1936 O.A.G. No. 5655 and 1936 O.A.G. No. 6000.

by the trial courts was affirmed in the Courts of Appeals. The Supreme Court likewise ratified, but by the "majority" of two-to-five.[55]

The petitioner gained a hearing in the United States Supreme Court—claiming (a) that the restriction on the voting power of the Ohio Supreme Court was a denial of a republican form of government,[56] and of due process,[57] and (b) the resulting situation, wherein the statute is often void in some districts but valid in others, abridges the equal protection clause of the Fourteenth Amendment.

Writing for a unanimous court in dismissing the appeal, Chief Justice Hughes reminded that Congress, not the Supreme Court, is the proper agency to enforce the guarantee of republican government. As to denial of an effective appeal to the Ohio Supreme Court, he continued:

> . . . it is sufficient to say that, as frequently determined by this court, the right of appeal is not essential to due process, *provided that due process has already been accorded in the tribunal of first instance.* . . . The opportunity afforded to litigants in Ohio to contest all constitutional and other questions fully *in the common pleas court* and again in the court of appeals plainly satisfied the requirement of the Federal Constitution in this respect and the state was free to establish the limitation in question in relation to appeals to its supreme court in accordance with its views of state policy.[58]

Hughes did not rule on the objection that a statute may be void in one district of Ohio, yet constitutional in another:

> In invoking the equal protection clause of the Fourteenth Amendment, it is argued that the result of the application of the provision of the state Constitution may be that the same statute may be constitutional in a case arising in one county, and unconstitutional in another case arising in another county. . . . [It] is said that, from the standpoint of the state Constitution, the statute may operate unequally. . . . In the present instance, there has been as yet no conflict of decision.[59]

[55] (Mar. 27, 1929) 120 Ohio St. 464, 166 N.E. 407.
[56] United States Constitution, Art. IV, Sec. 4.
[57] Fourteenth Amendment.
[58] 74 L. Ed. at 715 (italics are mine).
[59] 74 L. Ed. at 716.

This decision appears limited, therefore, to the narrow holding that a litigant cannot complain of denial of due process where he is able to test all issues fully in the trial court and in one appellate court.

Questions remaining unanswered: (1) Are residents being denied equal protection when a statute has been actually held void for one county and constitutional for another?

(2) Is the restriction on the voting power of the Supreme Court *in an original mandamus action* a violation of due process under the Federal Constitution? Chief Justice Hughes said only that Art. IV, Sec. 2 does not violate the Fourteenth Amendment so long as "due process has already been accorded in the tribunal of first instance." But in a petition to the *original jurisdiction* of the Ohio Supreme Court (the decision of which will be controlled by a minority of two members), will the defendant have the opportunity "to contest all constitutional and other questions fully?"

(3) Where the litigant appeals to the Ohio Supreme Court from the ruling of an *administrative board* based on the validity of a statute, does not Art. IV, Sec. 2 abridge due process in requiring a concurrence of six judges before the Court can reverse the order?

IV

The Supreme Court of Ohio has concurrent original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo.[60] If the litigants who invoke this original jurisdiction seek to test the constitutionality of a statute, will the Supreme Court be forbidden to invalidate the statute except by a concurrence of six of the seven judges?[61]

In *State*, ex rel. *Durbin* v. *Smith, Secretary of State* (June

[60] Ohio Constitution, Art. IV, Sec. 2. The Courts of Appeals have identical jurisdiction: Constitution, Art. IV, Sec. 6.

[61] *Cf.* 66 A.L.R. 1467n, "Validity and Effect of Provisions Limiting the Power of Courts to Declare a Statute Unconstitutional."

16, 1921), 102 Ohio St. 591, 133 N.E. 457, William Durbin petitioned the Supreme Court for a writ of mandamus to require the Secretary of State to take preliminary steps for the holding of a referendum[62] on an act[63] to create a new administrative code. The Secretary refused, because the act had been declared an emergency measure by two-thirds vote of both houses of the Assembly, hence not subject to referendum.

A majority of four judges concurred in a *per curiam* decision. The first half of the opinion contained the *belief* of Justices Jones and Matthias that the fact of emergency as declared by two-thirds vote of the Legislature could not be reviewed by the Court. Then Justices Jones and Matthias joined with Judges Hough and Robinson in holding that even if the Court does have power to inquire into the declaration of emergency, the Assembly *in this case* had not acted unreasonably.

Since four justices concurred in the reasonableness of the emergency, this case, in my opinion, is not an example of two members overriding the vote of a majority of judges as to the unconstitutionality of a statute. In the light of the canon of constitutional construction,[64] that a court should never rule on the constitutionality of a statute if the case can be decided on some other basis, the statements of Jones and Matthias as to the voting requirement of the Ohio Court in constitutional cases are unwarranted dicta.[65]

[62] Ohio Constitution, Art. II, Sec. 1c.

[63] 109 O.L. 105.

[64] *Cf.* opinion of Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority* (1936), 297 U.S. 288, 80 L. Ed. 688, 56 S. Ct. 466.

[65] Carl L. Meier, however, has included this case as an illustration of the power of two judges in an original mandamus suit ([1931] 5 U. of Cinn. L. R. 293, at 298): "Two judges *held* that the necessity of an emergency clause could not be reviewed by the courts. For this reason the supreme court could not declare such clause unconstitutional and order a referendum." My view, that this case is inconclusive as to the belief maintained by Meier, is affirmed by Cowen, J., in *Burns* v. *City of Marietta* (May 6, 1929), Common Pleas of Washington County, 27 O.N.P. (N.S.) 497 at 514.

In *State*, ex rel. *Williams* v. *Industrial Commission of Ohio* (Mar. 8, 1927), 116 Ohio St. 45, 156 N.E. 101, the relator, an injured employee, invoked the original jurisdiction of the Supreme Court in mandamus to compel the Industrial Commission to compensate the relator from its surplus fund because the employer was insolvent. Ohio G.C. Sec. 1465-75 (as amended March 26, 1925)[66] orders such payments from a fund (raised from premiums paid by solvent employers) when the employer of the injured party is insolvent. Three judges, finding no constitutional objection to the act, granted the peremptory writ. Four members, in this case a "minority," believed that forcing solvent business men to pay the debts of their insolvent competitors is "violative of the due process clause found in Articles V [!] and XIV of the Amendments to the Federal Constitution."[67]

Attorneys Waymon B. McLeskey and Wilbur E. Grabiel for the relator were wise in commencing the action in the Supreme Court. For, if the case had originated in a court of appeals unsympathetic to the statute, then, on appeal to the high tribunal, the four dissenting judges above could have controlled the decision and hence denied relief.[68]

Voting procedure was standardized by the time of *State*, ex rel. *Jones* v. *Zangerle, Auditor* (Dec. 21, 1927), 117 Ohio St. 507, 159 N.E. 564. One Jones had become Common Pleas judge of Miami County for a six-year term beginning February 9, 1925. At that time, Ohio G.C. Sec. 2253 authorized a per diem stipend of $10 whenever a judge should be assigned to

[66] 111 Ohio Laws 218.

[67] 116 Ohio St. 45, at 48.

[68] Final relief was ordered for the employee in *State* ex rel. *Williams* v. *Industrial Commission of Ohio* (June 13, 1928), 119 Ohio St. 47, 161 N.E. 486. The case was followed in *State*, ex rel. *Davis* v. *Industrial Commission of Ohio* (Apr. 18, 1928), 118 Ohio St. 340, 161 N.E. 32, five justices concurring. *Cf. State* v. *Industrial Commission of Ohio* (Ct. Appls., First App. Dist., Nov. 30, 1931), 41 Ohio App. 549, 180 N.E. 204, 11 O. L. Abs. 611, where a similar writ of mandamus was sought in the Common Pleas of Hamilton County.

duty in another county by the Chief Justice of the Supreme Court. On May 11, 1927 the Legislature amended Ohio G.C. Sec. 2253 to increase the pay to $20 per day. From September 6, 1927 to October 1, 1927 Judge Jones was assigned to Cuyahoga County; but Auditor Zangerle refused to warrant him any more than $10 per day, since Art. IV, Sec. 14 of the State Constitution provided that the compensation of a Common Pleas judge shall be neither increased nor decreased during his existing term of office; thus Sec. 2253 would be unconstitutional as applied to Judge Jones. In an original mandamus action to compel the Auditor to warrant $20 per diem compensation, the Supreme Court granted relief, although four justices believed the statute void as applied to the relator. The "majority" of three members held the limitation in Art. IV, Sec. 14 to apply only to the measure of annual salary.[69]

V

What procedure has the Supreme Court devised in determining constitutional issues on appeals from orders of administrative boards? Art. IV, Sec. 2 of the Constitution is not explicit.

The Court has founded a sane answer in such a precedent as *Royal Green Coach Co.* v. *Public Utilities Commission* (Apr. 1, 1924), 110 Ohio St. 41, 143 N.E. 547. On November 14, 1923, the Coach Co. had applied for a certificate of public convenience-and-necessity to operate a bus line between Dayton and Oxford via Hamilton, under Ohio G.C. Sec. 614-84, but was refused in favor of rival operators. On error direct to the Supreme Court to test the validity of this Act empowering the Commission to discriminate among applicants, the Court upheld

[69] In both this *Zangerle* case, the *East Cleveland* case, and the *Williams* case the less-than-four judges controlling the final decision wrote the *first* opinion. Contrast this with the *De Witt* case, in which the opinion of the two members controlling the decision was relegated behind the opinions of the five ineffective dissenters. Is the Supreme Court muddled in even this technical point of the arrangement of opinions?

such power, by an apparent vote of zero-to-five. The Court had followed the same course as if the Act had been upheld in a Court of Appeals.[70]

VI

If you were to drive through a series of safety zones in an Ohio city, you might soon learn that a municipal ordinance is *law*. But, has the Supreme Court considered an ordinance to be a "law" within the restriction on the voting power of the Court? Art. IV, Sec. 2 itself sheds no light.[71]

The first opportunity to decide this question came in *Fullwood* v. *City of Canton* (Mar. 29, 1927), 116 Ohio St. 732, 158 N.E. 171 on error from the Court of Appeals of Stark County, which had upheld an ordinance of the City of Canton to provide for the examination and licensing of electricians. The Court resolved two problems with the views as follows:

(1) Does this ordinance violate any constitutional provision?

Yes	*No*
Allen	Jones
Day	Matthias
Kinkade	
Marshall	
Robinson	

(2) Is an ordinance a "law" as used in Art. IV, Sec. 2?

No	*Yes*
Jones	Allen
Kinkade	Day
Marshall	Robinson
Matthias	

Therefore, the vote on the judgment:

[70] The decision was approved in *Ohio Valley Transit Co. et al.* v. *Public Utilities Commission of Ohio* (May 27, 1931), 124 Ohio St. 212, 177 N.E. 593, concurred in by a unanimous court.

[71] The United States Supreme Court has held that ordinances are "laws" of the state within the federal constitutional provision that no state shall pass any "law" impairing the obligation of contract: *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.* (1888), 125 U.S. 18, 31 L. Ed. 607, 8 S. Ct. 741.

For affirmance of the decision of the Court of Appeals:

five { Jones, Matthias — because the ordinance does not violate any higher authority.

five { Allen, Day, Robinson — because an ordinance is a law within Art. IV, Sec. 2, and therefore their decision must necessarily, *by the terms of the Constitution,* be conditioned on the fact that two members of the Court believe the "law" does not violate any higher authority.

For reversal of the judgment of the Court of Appeals:

two { Kinkade, Marshall — because the ordinance violates a constitutional guarantee and because an ordinance does not fall within the meaning of Art. IV, Sec. 2.

Hence, the Court of Appeals was upheld by a vote of five-to-two;[72] there was no holding on whether an ordinance is a "law" under Art. IV, Sec. 2.

[72] Edwin O. Stene, then Asst. Prof. Political Science, U. of Kansas, in (1935) 9 U. of Cinn. L. R. 23, criticizes the procedure and judgment of this case. In his opinion, the judges should first have voted on whether an ordinance was a "law," and have made this vote *binding* upon the members of the Court as bearing on the remainder of the reasoning in this case; then, with this first point settled, the members should have voted as to whether the ordinance conflicted with a superior organ. Under this procedure the Court would have reached a contrary conclusion.

I disagree with Dr. Stene, and concur in the procedure adopted by the Court. Since Stene would force the judges, in a debated intermediate point in their reasoning, to settle the point conclusively on all members before proceeding to the next step, it may be asked: "Would he allow the judges to record a dissent on the second point, although denying to them the power to cause their disagreement on the first step to influence their final judgment?" In reaching their *final decision,* why should the first step in their reasoning be any less important than the second step?

The correct view, I submit, is for each judge to reach his final conclusion upon his own independent value judgments as to intermediate steps. The only exception is where the Constitution commands otherwise, as in Art. IV, Sec. 2, which orders the judges to take cognizance of the views of their

At last, in 1934, the Supreme Court uttered an opinion which will probably settle conclusively the problem whether an ordinance is a "law" within the meaning of Art IV, Sec. 2. The Court of Appeals for Stark County had declared *unconstitutional* an ordinance of the Village of Brewster to purchase a light and power plant on the installment plan. On April 11,

brothers and which doctrine Judges Allen, Day and Robinson adhered to in the *Fullwood* case. My point of view is illustrated by the voting procedure in *Ashwander* v. *Tennessee Valley Authority* (1936), 297 U.S. 288, 80 L. Ed. 688, 56 S. Ct. 466, where a majority was formed by judges who reached their conclusion upon intermediate steps in a complete trend of reasoning.

In *F. H. Fullwood* v. *City of Canton, Ohio et al.* (Oct. 17, 1927), 275 U.S. 484, 72 L. Ed. 386, 48 S. Ct. 31, the United States Supreme Court dismissed a motion for writ of error because of inadequate showing of a Federal question. Thus a decision on the validity of Art IV, Sec. 2 under the Federal Constitution was temporarily postponed.

A similar split of views in *Meyers* v. *Copelan, Chief of Police* (Oct. 26, 1927), 117 Ohio St. 622, 160 N.E. 855 for a second time blocked a holding as to the nature of an ordinance. The Court of Appeals of Hamilton County had upheld Sec. 845 of the Ordinances of Cincinnati prohibiting public auctions of jewelry. (The petitioner Meyers, a regular jewelry merchant who desired to auction his stock because his store was to be torn down, had sought in the Common Pleas of Hamilton County to enjoin the enforcement of the ordinance as violating the guarantees of Secs. 1 and 19 of the Ohio Bill of Rights and the Fifth [!] and Fourteenth Amendments of the Federal Constitution.) Again Justices Jones, Kinkade, Marshall and Matthias believed an ordinance not to be a "law" within Art. IV, Sec. 2. But this view of the four judges was dictum. For, Jones, Kinkade and Marshall voted for the affirmance of the judgment below because they held that this ordinance violated no constitutional guarantee; and Allen, Day and Robinson (who all believed the ordinance a violation of fundamental guarantees) concurred because they believed the restriction in Art IV, Sec. 2 to cover an ordinance and because more than one justice was of the opinion that no guarantee was infringed.

What to make of this decision in the *Meyers* case confronted Common Pleas Judge Bell of Hamilton County, the following year, when the same ordinance was attacked [*Harry I. Michaelson* v. *City of Cincinnati* (Apr. 1928), 27 O.N.P. (N.S.) 100]. It was suggested to him that since four justices of the Supreme Court had ineffectually expressed disapproval of the ordinance, he was bound by that view—just as his colleague Judge Darby, in the *Crawford* case, *supra* p. 20, had followed a previous "minority" opinion of five Supreme Court justices. Judge Bell balked at this procedure: "If this court was to follow the opinion of the majority of the *judges* rather than the judgment of the *court*, it would be doing by indirection that which the Constitution prohibits being done." Bell's stand is proper; in effect he reaffirmed what his Court of Appeals had pronounced and which could not be overturned by the Supreme Court.

1935, the Supreme Court affirmed this decision by the adequate majority of five votes (*Village of Brewster et al.* v. *Hill*, 128 Ohio St. 343, 190 N.E. 766). The litigation appeared fully and satisfactorily closed.

But, *mirabile dictu*, the Court by Justice Jones rendered an additional "opinion" on June 6, 1934. Admittedly ever since the *Fullwood* case the Bar was perplexed as to the constitutional status of an ordinance. Hence, Jones explained:

> [128 Ohio St. at 355] Since the personnel of this court has notably changed in recent years, counsel indicate that they would like the opinion of the present bench upon this important question of constitutional construction.
>
> [at 356] . . . we have complied with the indicated wish of counsel by giving reconsideration to the question of the constitutional construction of Section 2, Article IV of the State Constitution, and whether that section applies to ordinances as well as to statute law.

Whereupon all the justices[73] concurred that an ordinance is not a "law" within Art IV, Sec. 2. This entire opinion was advisory.[74]

VII

In 1929 the Assembly ratified the "advisory" jurisdiction of the Supreme Court.[75] In a criminal case, if the trial judge rules a point of law against the prosecuting attorney, the latter may seek a review by the Supreme Court of the disputed decision. Even if the Supreme Court should disapprove the ruling of the trial judge, it cannot reverse the final judgment of the Common Pleas, except on appeals from certain prelimi-

[73] Weygandt, C. J., Bevis, Matthias, Stephenson, Wilkin and Zimmerman. Justices Allen, Day and Robinson, who had controlled the voting in the *Fullwood* and *Meyer* cases, had left the bench.

[74] In *Wilson* v. *City of Zanesville* (Dec. 18, 1935), 130 Ohio St. 286, 199 N.E. 187, the Court ruled that an ordinance is not a law within Art. II, Sec. 34 of the Ohio Constitution, providing: "*Laws* may be passed . . . regulating the hours of labor. . . . "

[75] Ohio G.C. (June, 1937) Secs. 13446-1 to 13446-4; formerly Ohio G.C. Secs. 13682 to 13684.

nary rulings;[76] the opinion shall be merely directed upon trial judges in future cases.

If, therefore, in a criminal proceeding, the Common Pleas should favor the accused by holding a statute constitutional (or unconstitutional, as the case may be), and if the prosecutor should refer the decision to the Supreme Court, will the voting restriction in Art. IV, Sec. 2 bind the Supreme Court in rendering its *advisory* opinions as to the validity of the disputed statute?

This situation has precedent in *State of Ohio* v. *Whitmore* (March 29, 1933), 126 Ohio St. 381, 185 N.E. 547.[77] The prosecution appealed from a ruling of the Common Pleas of Lucas County as to the definiteness of an indictment. The Supreme Court justices doubted whether such *advisory* rulings were violative of the rule against double jeopardy.[78] Stephenson and Allen, J. J., believed the statute constitutional after striking out the power of the Supreme Court ever to reverse the trial court for that particular prosecution.[79] These two votes negated those of four other justices who regarded the statute unconstitutional.[80]

[76] In order not to violate Ohio Constitution, Art. I, Sec. 10: "No person shall be twice put in jeopardy for the same offense."

[77] This is the latest case which I have found in which a "minority" has effectively defended the validity of a statute. In (March, 1937), 35 Michigan L. R. at 776, Fite and Rubenstein (*supra* p. 2n) wrote: " . . . since 1928 there have been no minority decisions sustaining legislation in Ohio."

[78] Ohio G.C. Sec. 13446-4 states: "If the supreme court is of the opinion that the questions presented by such bill of exceptions should be decided, it shall allow the bill of exceptions to be filed and render a decision thereon; which decision shall not affect the judgment of the court of common pleas in said cause, nor shall said judgment of the court of common pleas be reversed, unless the judgment of the supreme court reverses the judgment of the court of common pleas on its ruling on a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment; in all *other* cases the decision of the supreme court shall determine the law to govern in a similar case."

[79] The two judges would deny the power of the Supreme Court to reverse the trial court on its ruling on a motion to quash, a plea of abatement, a demurrer, or a motion in arrest of judgment.

[80] Kinkade, the seventh judge, did not participate. This decision on the validity of the criminal advisory jurisdiction of the Supreme Court has prob-

VIII

Has the Ohio system proved desirable? fruitful enough to urge upon the Federal government? (1) No doubt the presumption in favor of constitutionality of a statute has been strengthened in a positive way; several judgments have been upheld on the basis of a statute despite the majority opposition in the Supreme Court. In this respect, the reform has succeeded. Maybe that should be the sole criterion of "worthwhileness."

(2) Procedurally, there has been difficulty. Chief Justice Marshall[81] urged repeal of the amendment on that ground:

> . . . it has become apparent that the purposes which were in the minds of the constitutional convention and of the electorate have not been served. If it was intended to strengthen the legislative branch of the government, and relatively weaken the judicial branch, that intent has likewise failed. While the constitutional provision has taken from the Supreme Court the power to declare a legislative act to be unconstitutional by a bare majority vote, it has left an unlimited power to do so in the Court of Appeals. Manifestly, the Constitutional Convention did not desire to invest more power in the intermediate courts than was invested in the court of last resort, and yet, in practice, . . . the Court of Appeals has become the final arbiter of constitutional questions in many important cases.[82]

William Eggars, in 1931,[83] remarked that the system " . . . in practice has produced dissatisfaction. . . . "

W. A. Maddox, in 1930, likewise disapproved the Ohio plan, but his reason appears superficial:

ably been overturned; for seven judges concurred in a dictum in *Eastman* v. *State of Ohio* (Apr. 1, 1936), 131 Ohio St. 1, 1 N.E. 2nd 140 that the advisory system violates Art. IV, Sec. 6 of the Constitution.

[81] In *Board of Education* v. *Columbus* (1928), 118 Ohio St. 295, 160 N.E. 902.

[82] In like vein, Carl Meier [(1931) 5 U. of Cinn. L. R. at 310] wrote: "Should the voters of Ohio decide in 1932 to call a convention for the revision of the present Constitution, it is submitted that the amendment to Article IV, section 2 . . . should be speedily removed."

[83] In "Influence of the Non-Participating Judge," 5 U. of Cinn. L. R. 375, at 376.

Litigants, in place of finding a uniform law throughout the state, may find a law applicable in one jurisdiction while it is void in another. Certainly this is not an end to be desired.[84]

But the voters have not chosen to repeal the restriction. So that Ohio judges must either resign themselves to the procedural web they have spun themselves into, or alter their court procedure to make the amendment more workable. In 1930, Harvey Walker[85] suggested an amendment to require "an identical majority, in constitutional cases, to *affirm* a judgment of the court of appeals declaring a law *unconstitutional.*" Is there enough enthusiasm to pass such an amendment?

Edwin O. Stene, in 1935,[86] approved of the existing voting restriction and chided the Supreme Court members for their failure to adapt themselves to the novel regulation. One of his proposed improvements was a constitutional amendment to deny to the lower courts any power to pass on the constitutionality of a law.[87]

My own view is to recognize the impracticability of an amendment, and to alter the court practice (by self-imposed rules of procedure) so as to harmonize Art. IV, Sec. 2 with the dominant purposes of the Convention of 1912. To my belief, those purposes were: (a) to give each litigant one trial, one final review; (b) as far as possible, each Court of Appeals should be the highest interpreter of the law for its appellate district; (c) the Supreme Court should not overturn the opinion of a Court of Appeals on a constitutional decision unless the decision is clearly mistaken; and (d) to enhance the presumption in favor of the validity of a statute.[88]

[84] "Minority Control of Court Decisions in Ohio," 24 American Political Science Review 638.

[85] Then Asst. Professor of Political Science, Ohio State University; "Need for Constitutional Revision in Ohio," 4 U. of Cinn. L. R. 339, at 348.

[86] Then Asst. Professor of Political Science, University of Kansas; "Is There Minority Control of Court Decisions in Ohio?" 9 U. of Cinn. L. R. 23.

[87] How could this amendment meet the test of the *Akron Metropolitan Park District* case, *supra* p. 27?

[88] I am not unaware that the popular pressure of the day was to "hamstring" the reactionary Supreme Court.

In the light of these principles, the trial judge should follow the constitutional rulings of his own Court of Appeals; only when at least six of the Supreme Court justices agree *in a holding* as to the invalidity of a statute should the trial judge be permitted to disregard the ruling of his Court of Appeals.[89] If his Court of Appeals has not ruled on the issue, the trial judge should make an independent judgment on the validity of the act, regardless of what five of the Supreme Court justices may have said.[90] (As to the inconsistencies arising from the privilege of a litigant to bring original mandamus in either a lower court or in the Supreme Court, I have found no tenable solution.)[91] At least, there would be a regularized procedure raised from the present chaos.

Would the same procedural difficulties spring from the plan to limit the United States Supreme Court to declare laws unconstitutional only by six-to-three decisions? The Hon. Robert Blair-Smith[92] believes the same difficulties of the Ohio Amendment would arise under the proposal to restrict the United States Courts:

> Although an amendment to the Constitution of the United States might be phrased differently [from the Ohio provision], I think the same difficulty would arise. For instance, if it were provided that the court could not declare a law unconstitutional except by a 6-3 vote, and the judges voted 5-4 to affirm a judgment of the Circuit Court of Appeals holding the law unconstitutional, would the decision of the Circuit Court of Appeals be reversed by the vote of one minority judge in the Supreme Court, or would it stand unreversed?

[89] This is the view taken by Judge Bell in *Michaelson* v. *Cincinnati* (1928), 27 O.N.P. (N.S.) 100. I disapprove the stand of Judge Darby in *Ohio* v. *Crawford* (1927), 26 O.N.P. (N.S.) 519.

[90] Local conditions may have a peculiar effect on the "reasonableness" of the law. Of course, the trial judge would be bound by the holding of six or seven members of the Supreme Court. *Caveat*, the United States Supreme Court has never ruled whether a State statute, applied in one district and voided in another, is consistent with due process.

[91] It has been suggested that this be retained as one of the few remaining tools for the clever pleading lawyer.

[92] Of Milbank, Tweed, Hope & Webb, 15 Broad Street, New York City; he is one of a Committee on Federal Legislation of the local Bar Association. His views are contained in a letter to Cloyd Laporte, of Root, Clark, Buckner & Ballantine, 31 Nassau Street, New York City, dated Oct. 7, 1937.

NORTH DAKOTA

By an amendment in 1919, the Constitution of North Dakota, Art. IV, Sec. 89, provides:

> The supreme court shall consist of five judges; . . . provided, however, that in no case shall any legislative enactment or law of the state of North Dakota be declared unconstitutional unless at least four of the judges shall so decide.[93]

The open terms of this amendment reveal two differences in procedure from the Ohio provision. (1) The North Dakota amendment limits the voting power of the Supreme Court only as to "any legislative enactment or law *of the state of North Dakota.*" The North Dakota Court can declare an Indiana statute void without restriction. On the other hand, the Ohio Constitution—"No law shall be held . . . void"—does not distinguish between an Ohio and an Indiana statute.[94]

(2) More important, unlike the Ohio provision, the North Dakota amendment does not expressly permit the Supreme Court to affirm, by a bare majority vote, the decision of a district court holding a North Dakota statute *invalid.* Rather, if a district court has rested its decision on the sole ground that a state statute is invalid, must the North Dakota Supreme Court reverse the judgment unless four of the five judges concur in affirming the court below?

The latter problem was settled in *Daly* v. *Beery, Auditor* (April 20, 1920), 45 N.D. 287, 178 N.W. 104, the first case involving a minority decision. The District Court of Grant County had held Ch. 188 of the laws of 1919 unconstitutional (despite the fact that this act had been approved, a few months previously, by a popular referendum). Only four Supreme Court justices heard the appeal, and divided, two-to-two, which normally would have resulted in an affirmance of the court below. Yet the Supreme Court reversed the decision and up-

[93] The North Dakota Supreme Court comprises *five* members.

[94] I know of no case where the Ohio Supreme Court has held itself restricted in ruling on the validity of a foreign statute.

held the statute because four judges had not concurred in voting to annul the act. The result, which would have been contrary in Ohio, insured a uniformity of operation of the statute throughout the State.[95]

In *State, ex rel. Sathre* v. *Board University Lands* (June 29, 1935), 65 N.D. 687, 262 N.W. 60, the District Court of Burleigh County had declared a special tax election act constitutional. On appeal, only two of the five justices of the Supreme Court believed the act constitutional; yet these two votes constituted a "majority" sufficient to affirm the judgment below.[96]

I have no instance where a North Dakota trial court has refused to be bound by a "minority" decision of the Supreme Court.

NEBRASKA

The Nebraska Constitution, Art. V, Sec. 2, as amended in 1920, provides: "No legislative act shall be held unconstitutional except by the concurrence of five judges." The Supreme Court comprises seven judges.

Since there have been no minority court decisions in Nebraska,[97] it is not known whether Nebraska will follow the procedural steps of Ohio or of North Dakota.[98]

[95] The procedure adopted in the *Beery* case was followed in *Wilson* v. *City of Fargo* (Oct. 31, 1921), 48 N.D. 447, 186 N.W. 263. The District Court of Cass County had voided a special election law. The Supreme Court voted three-to-two to affirm the invalidity of the act; nevertheless, the decision of the court below was reversed because of the failure of concurrence of four judges that the law was unconstitutional.

[96] The North Dakota judges have received the restriction with more equanimity than their Ohio brothers. The opinion of Justice Robinson is typical (in *Daly* v. *Beery*, 45 N.D. at 306): "A recent amendment to the Constitution indicates the people have come to learn that judges are not infallible, and it is well to limit the power to annul even an act of the legislature. . . . If the court have the power, by any majority, to hold void an act submitted to and approved by the people, the power is too dangerous and arrogant for use, except on occasions very extraordinary."

[97] Accord: Fite and Rubenstein (1937) 35 Mich. L. R. 780.

[98] In 1913 the Colorado Constitution was amended to set up two variant

checks on the judiciary—to deprive the trial courts of power to void laws, and to provide popular recall of judicial decisions:

[Art. VI, Sec. 1 (Effective Jan. 22, 1913)]. None of said courts, except the supreme court, shall have any power to declare or adjudicate any law of this state or any city charter or amendment thereto . . . as in violation of the Constitution of this state or of the United States.

[Sec. 2]. All such laws or parts thereof submitted as herein provided when approved by a majority of the votes cast thereon at such election shall be and become the law of this state notwithstanding the decision of the supreme court.

The restrictions were nullified by the Colorado Supreme Court in *People* v. *Western Union Telegraph Co.* (Apr. 4, 1921), 70 Colo. 90, 198 P. 146 and *People* v. *Max* (Apr. 4, 1921), 70 Colo. 100, 198 P. 150. According to Justice Burke: "There is no sovereignty in a state to set at naught the Constitution of the Union and no power in its people to command their courts to do so. That issue was finally settled at Appomattox." *Cf.* 15 A.L.R. 326, "Validity and Effect of Provisions Limiting the Power of Courts to Declare a Statute Unconstitutional."